Filed 9/25/12 Adato v. City of Los Angeles CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHLOMO ADATO, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B230681, B233559 (Los Angeles County Super. Ct. No. EC048549)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, David S. Milton, Judge. The judgment is affirmed in part, reversed in part and remanded. The postjudgment order is reversed.

The Homampour Law Firm, Arash Homampour and Wendi O. Wagner for Plaintiff and Appellant Shlomo Adato.

Horvitz & Levy, Karen M. Bray and Mark A. Kressel; Willis DePasquale, Larry N. Willis, Scott S. Blackstone; Early, Maslach & Van Dueck, John C. Notti, Paul A. Carron and James Grafton Randall for Defendants and Respondents Park Plaza West Senior Partners and Western Community Housing, Inc.

Carmen A. Trutanich, City Attorney, Amy Jo Field and Blithe S. Bock, Deputy City Attorneys, for Defendant and Respondent City of Los Angeles.

Shlomo Adato was injured when his motorcycle crashed into a car making an illegal left turn out of the driveway of an apartment complex. Adato sued the owners of the apartment building, Park Plaza West Senior Partners and Western Community Housing, Inc. (collectively the Park Plaza parties), and the City of Los Angeles for negligence. Judgment was entered in favor of the Park Plaza parties after the court granted their motion for summary judgment and for the City after a bench trial.

On appeal Adato contends the trial court incorrectly asked whether the Park Plaza parties had a duty to warn of a dangerous condition on the public street, rather than whether they had a duty to exercise reasonable care in the design and construction of the driveway to the apartment complex. The answer to the properly framed question, he insists, is that such a duty exists under Civil Code section 1714 and the Park Plaza Parties failed to establish any categorical exception to this general duty of care. Adato also contends the court erred in ruling the City was insulated from liability by the design immunity doctrine. We reverse as to the Park Plaza parties and affirm as to the City.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident and This Lawsuit*

On the morning of August 5, 2007 Adato was riding his motorcycle northbound on Whitsett Avenue in North Hollywood at the same time as Jeanne Mullikin, then 85 years old, was making a left turn out of the driveway of the Piedmont, a 198-unit seniors apartment complex, to go south on Whitsett Avenue. The street, which consists of two northbound lanes and two southbound lanes, was striped directly in front of the Piedmont's driveway with two sets of double yellow lines more than two feet apart, indicating a left turn out of the driveway was prohibited. (See Veh. Code, § 21651, subd. (a).) As Mullikin turned left from the driveway, Adato crashed his motorcycle into the driver's side of her vehicle, sustaining injuries.

Adato sued the Park Plaza parties and the City for negligence.[1] In the operative first amended complaint, Adato alleged the Park Plaza parties had created a dangerous

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1 Adato settled his claims against Mullikin before initiating this lawsuit.

condition on their property and on the public road by constructing the Piedmont's driveway at a location where left turns were prohibited without posting a sign on their premises warning motorists of that prohibition. The complaint also alleged the City was negligent in failing to erect a barrier at the center of the street to prevent or discourage left turns from the driveway or to post a right-turn-only sign on public property near the driveway.

The Park Plaza parties filed a cross-complaint against the City for indemnification, apportionment of fault and declaratory relief.

2. *The Motions for Summary Judgment*

In December 2009 the Park Plaza parties and the City moved for summary judgment. The Park Plaza parties asserted they owed no duty to Adato as a matter of law because they did not own, possess, maintain or control the public street where the accident occurred. Although they acknowledged a legal duty could exist if they had maintained their property in an unsafe manner, they contended there was no evidence to support such an allegation: Specifically, there was nothing about the driveway itself that forced drivers leaving the property to make a left turn onto Whitsett Avenue.[2] Finally, they argued Adato could not show the existence of a right-turn-only sign would have prevented the accident, particularly since Milliken had ignored the warning provided by the striping on the street, and thus could not prove causation.

With their moving papers, the Park Plaza parties submitted evidence there had been no other reported accidents at the location despite the fact nearly six to seven million vehicles travelled on that segment of Whitsett Avenue every year and approximately 260 vehicles used the driveway to leave the Piedmont's parking structure each day. David Royer, a civil and traffic engineer, testified he had conducted a site inspection of the premises and concluded the street striping was clearly visible to vehicles

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2 In his declaration in support of the motion, the president of Western Community Housing explained construction of the Piedmont began in approximately August 2001 and was completed in December 2002. A certificate of occupancy for the Piedmont was issued in December 2002, and tenants began moving into the complex in January 2003.

entering and leaving the apartment complex. Royer also testified there were no visibility obstructions for vehicles leaving the premises on the driveway and there was a 72-foot parking prohibition signaled by a red curb on the left side of the driveway. According to Royer, stopping sight distance guidelines call for 300 feet of visibility for vehicles leaving the subject driveway based on a 42-mile-per-hour critical speed; and drivers actually had more than 300 feet of visibility for northbound vehicles approaching the "number two (curb) lane and approximately 2000 feet of visibility for north bound vehicles approaching in the number one lane on Whitsett." The property manager for the Piedmont testified she had not received any complaints or comments expressing any safety concern regarding vehicles entering or leaving the driveway.

In its summary judgment motion, the City argued there was no dangerous condition of public property as a matter of law and, in any event, it was immune from liability under Government Code sections 830.6 (design immunity), which provides public entities with an affirmative defense to liability for a dangerous condition arising from a public plan or design under certain circumstances. The City also utilized the expert declaration of David Royer, who testified the Los Angeles Department of Transportation Striping and Signing Plan (Plan No. A-0361) had been approved by the City's principal transportation engineer in 1990. Royer opined no further restrictions such as additional signage or concrete medians were required in this case, where the striping was plainly visible to motorists leaving the driveway and there had been no prior accidents or complaints to indicate a dangerous condition.

In opposition to the Park Plaza parties' motion, Adato contended they had erroneously conflated the concepts of duty and breach. A landowner's duty of reasonable care, he argued, includes the duty to make its driveway safe for those using it and those on the adjacent public road; and there was no reason under California law or public policy to limit the scope of that duty in the circumstances presented here. The wholly separate issue whether the Park Plaza parties had acted unreasonably and breached that duty by not posting a right-turn-only sign on its premises was not presented in Park Plaza's motion for summary judgment and, in any event, was a factual question for the

jury. Adato included evidence the driveway leading into and out of the Piedmont's garage was located approximately 40 feet north of the old driveway and, when the striping plan for Whitsett Avenue was created in 1990, a person could legally turn left onto Whitsett Avenue from the old driveway.

In opposition to the City's motion, Adato argued there were questions of fact whether the absence of a barrier or signage in front of the Piedmont constituted a dangerous condition. He also argued questions of material fact existed as whether design immunity was available here, where Plan No. A-0361, adopted in 1990, did not contemplate the driveway, which was constructed in 2001-2002 when the apartment building was built.

As to both motions, Adato included in his opposing papers a declaration by Dr. David Krauss, a human factors expert, and Edward Ruzak, a civil and traffic engineer. Krauss testified cars parked on the east side of Whitsett Avenue, south of the premises, as well as cars using the alley to the south of the driveway, create a visual obstruction that hinders the ability of drivers leaving the property to view northbound traffic. He also explained drivers making a left turn out of the apartment complex necessarily have to attend to multiple variables, including northbound and southbound traffic on Whitsett Avenue, traffic entering or leaving the alley to the south of the driveway and traffic that may be turning onto southbound Whitsett Avenue from nearby Vanowen Street. Such divided attention results in "reduced time and cognitive resources" to process the street-striping prohibition. Krauss opined that physically preventing left turns would have "reduce[d] drivers' cognitive loads and distraction and decrease[d] the likelihood of an accident at the incident location."

Citing similar factors, Ruzak opined the driveway was dangerous in that people making left turns could cause an accident. He testified the City should have put a concrete median or flexible candlesticks in between the two sets of double yellow lines to emphasize to drivers leaving the apartment complex that left turns were prohibited. He also opined the Park Plaza parties could have reduced the likelihood of an accident by placing a no-left-turn (or right-turn-only) sign on its driveway.

3. *The Court's Order Granting the Park Plaza Parties' Motion and Denying the City's Motion*

The trial court granted the Park Plaza parties' motion for summary judgment, defining the nature of the duty as one requiring the posting of a right-turn-only sign and finding no such duty existed.[3] As to the City's motion, the court sustained several of Adato's objections to Royer's testimony concerning the City's design plan and ruled there were issues of material fact as to whether a dangerous condition existed and whether design immunity, if applicable at all, had been lost after the driveway was built.

4. *The Bifurcated Court Trial on the City's Design Immunity Defense*

Prior to trial on Adato's remaining negligence claim against the City, the court granted the City's motion pursuant to Code of Civil Procedure section 597 to bifurcate its affirmative defense of design immunity and resolve that issue first in a bench trial.[4] Three witnesses testified at trial: John Fisher, a civil and traffic engineer in charge of transportation operations for the City; Weston Pringle, another civil and traffic engineer; and Edward Ruzak.

Fisher testified he had the discretionary authority to approve, and did approve, Plan A-0361 in 1990. The design plan specified, among other things, the number of lanes, lane widths, the length of the left turn pockets and street striping; signage was determined not to be necessary. Fisher explained the two sets of double yellow lines were not intended to prevent persons from turning left out of the driveway because in 1990, when the plan was adopted, the driveway did not exist—the apartment complex had not yet been built, and the driveway at that location had yet to be constructed.

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3 After the Park Plaza parties' motion for summary judgment was granted, their cross-complaint for indemnity against the City was dismissed without prejudice.

4 In accordance with *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 66, the court had ruled whether substantial evidence supported the reasonableness of the plan, an element of design immunity, would be resolved first by the court. The other elements of design immunity would thereafter be tried to the jury together with the other issues in the case. Following that ruling, however, the parties agreed to resolve all issues relating to design immunity in a bench trial.

Rather, they were intended to serve as a "as a transition between the left-turn pocket lane, going in one direction, and the two-way left turn lane . . . ." Fisher acknowledged the driveway had been moved 40 feet south of its original location (where it was the entrance to a parking lot) in 2001-2002 with the building of the 198-unit apartment complex, but explained construction of that complex in a mixed-use location was not considered a "major change" that would have altered traffic conditions and required a new plan. (Fisher contrasted the apartment complex with a shopping center, which would have substantially increased traffic and necessitated a review of the plan.) He also testified the City does not consider the age of the apartment residents (the Piedmont identifies itself as "luxury senior apartments," and most residents are senior citizens); if a driver has a driver's license, he or she is presumed to know and obey traffic laws. The City would have reexamined its design—and considered additional measures such as flexible tubular channelizers (tall, thin flexible cones) or concrete medians—if it knew the striping was inadequate to prevent people from making left turns. However, the City had no notice there were any problems at that location, and no accidents other than Adato's had occurred.

Pringle testified as an expert witness for the City. Like Fisher, Pringle opined the construction of the Piedmont did not create a major change of conditions requiring consideration of a new plan. He testified the street striping/traffic plan was reasonable in 1990 and remained reasonable following completion of the apartment complex because the location of the new driveway did not create a dangerous condition. Pringle acknowledged on cross-examination that additional measures such as flexible tubular channelizers or concrete medians may be appropriate if a history of traffic incidents (accidents or complaints) had suggested there were problems at the location.

Ruzak testified as an expert witness for Adato, reiterating and elaborating on the testimony he had provided in his declaration supporting Adato's opposition to the summary judgment motions. Ruzak explained, prior to construction of the apartment complex, the site was a parking lot, with a driveway located approximately 40 feet south of its current location. Left turns from the original driveway were not prohibited.

According to Ruzak, the relocation of the driveway without the erection of a sign or some barrier to prevent left turns created a dangerous condition. Drivers making left turns out of the driveway would find their sight obstructed by parked cars and utility poles. The street striping, he explained, was insufficient to guard against left turns from the driveway. A motorist emerging from the driveway would not have a proper sight angle to determine the width of the yellow lines—and thus their purpose—until he or she got closer to the street.[5] In fact, he had personally observed several people making left turns out of the driveway during his site inspection. Whether or not Plan A-0361 was reasonable when it was adopted in 1990, Ruzak opined it had become unreasonable with the completion of the apartment complex and the relocation of the driveway. According to Ruzak, the City should have reviewed and revised the plan after the driveway was relocated, installing flexible tubular channelizers between the two sets of double yellow lines. The channelizers would have been a more visible signal than street striping alone and served as a functional barrier, thereby making the driving conditions safer at the location.

The court ruled in the City's favor, finding it had established its entitlement to design immunity and Adato had not demonstrated the immunity had been lost.

5. *The Postjudgment Order Awarding the Park Plaza Parties Costs*

On January 31, 2011, following entry of judgment in the Park Plaza parties' favor, the Park Plaza parties served their memorandum of costs, which included a request for $62,079.47 in expert witness fees, based on Adato's rejection of its Code of Civil Procedure section 998 offer to compromise. On February 18, 2011 Adato moved to tax costs. On April 6, 2011 the trial court granted Adato's motion. The City moved for reconsideration. On May 11, 2011 the court granted the City's motion for reconsideration and denied Adato's motion to tax costs. Adato has filed a separate appeal

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5 It is the width of the lines—two feet or more—that provides notice that left turns are prohibited. (See Veh. Code, § 21651, subd. (a).)

from the May 11, 2011 order. The Park Plaza parties also filed a protective cross-appeal from the April 6, 2011 order.

CONTENTIONS

Adato contends the Park Plaza parties have a duty to construct a driveway in a manner that does not appreciably and unreasonably increase the risk to users of the driveway and motorists on the adjacent street, and the trial court erred in categorically exempting from that broad duty any obligation of the developer to post a sign on the premises alerting drivers to the danger created by its decision to construct a driveway at the location. He also contends the court's design immunity findings following the bench trial are not supported by substantial evidence, and in any event, design immunity did not foreclose an action based on a failure to warn of a dangerous condition in a design.[6]

DISCUSSION

The Summary Judgment in Favor of the Park Plaza Parties

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

When a defendant moves for summary judgment directed to one of the elements of the plaintiff's cause of action, the defendant may, but need not, present evidence that conclusively negates the element. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 853.) Alternatively, the defendant may present evidence to "show[] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (Code of

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6 In his separate appeal from the trial court's postjudgment order, Adato challenges the court's ruling granting the Park Plaza parties' motion for reconsideration and denying his motion to tax costs. In light of our reversal of the judgment in favor of the Park Plaza parties, the postjudgment costs order also falls.

Civ. Proc., § 437c, subd. (p)(2); see *Aguilar*, at p. 853.) A defendant "has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff *does not possess* needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion." (*Aguilar*, at p. 854; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 ["[w]hen the defendant moves for summary judgment in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].)

Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.) On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *Summary Judgment for the Park Plaza Parties Was Improper*

a. *Governing law on landowner's duty of reasonable care*

A property owner has a legal duty to act reasonably in the management of his or her property, including maintaining his or her land in a reasonably safe condition in order to avoid exposing persons to an unreasonable risk of harm. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156; *Rowland v. Christian* (1968) 69 Cal.2d 108, 119; see Civ. Code, § 1714 ["[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself"].) This duty of care "includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716; see *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 58 ["'[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby'"].)

Generally, a property owner owes no duty of reasonable care to guard against injury on property over which it has no right of possession, management or control. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134; *Alcaraz v. Vece, supra,* 14 Cal.4th at p. 1156; see *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 488 (*Seaber*) ["[P]remises liability is predicated upon the concept that possession includes the attendant right to manage and control, justifying liability when one has failed to exercise due care in property management. [Citations.] [¶] 'The courts, therefore, have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management or control.'"].)

However, the location of the injury alone is not dispositive on the question whether a duty exists. The duty of reasonable care includes a duty to maintain one's own property in such a way as to avoid exposing persons on adjacent land to an unreasonable risk of injury. (*Garcia v. Paramount Citrus Assn., Inc.* (2008) 164 Cal.App.4th 1448, 1453 (*Garcia*); *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478; see *Kopfinger v. Grand Central Pubic Market* (1964) 60 Cal.2d 852, 857-860 [a landowner who creates a dangerous condition is liable for foreseeable injuries caused thereby, even if injury occurs on public roadway or sidewalk].) Thus, "California cases [that] have considered a property owner's duty in the context of injuries occurring off the property have imposed liability . . . if the harm was foreseeable and the owner controlled the site of the injury [citation], or affirmatively created a dangerous condition on the site [citation] or if there was a functional connection between the owner's conduct and the injury suffered." (*Rosenbaum v. Security Pacific Corp.* (1996) 43 Cal.App.4th 1084, 1091.)

b. *The Park Plaza parties failed to meet their burden on summary judgment to negate the element of duty*

Adato's complaint alleged the Park Plaza parties' development of the property and relocation of the driveway to a place where left turns are dangerous and prohibited by street striping, without a sign alerting those using the driveway to that danger and prohibition, created an unreasonable risk of a collision between motorists on the street and those leaving the Piedmont. Generally, as the Park Plaza parties argued, and the trial court found, a property owner's duty of reasonable care, although undoubtedly broad, does not include a duty to post a sign warning of traffic conditions on the public roadway. (See, e.g., *A. Teichert and Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663 (*Teichert*); *Seaber, supra,* 1 Cal.App.4th at pp. 487-488.) Neither of those cases, nor the proposition for which they stand, however, supports the judgment in favor of the Park Plaza parties here.

In *Teichert, supra,* 179 Cal.App.3d 657, a bicyclist riding westbound on a public highway was killed when he collided with an eastbound dump truck that was turning left from the public highway into a gravel plant. The bicyclist's survivor sued the gravel

plant owner (Teichert) for wrongful death, alleging Teichert should have posted a sign warning passersby on the public highway about the frequent truck traffic in and out of the plant. Teichert argued it had no duty to post such signs. After the trial court denied Teichert's motion for summary judgment or summary adjudication, the Court of Appeal granted Teichert's petition for writ of mandate and directed the court to grant summary judgment. The court explained a property owner has no duty to erect signs on public property for the purposes of controlling or regulating traffic on public roads over which the landowner has no control. In fact, the court continued, certain Vehicle Code sections prohibit such action, not only on public property, but also on private property if the sign would be "in view of" any traffic passing on the highway. (*Id.* at p. 664, citing Veh. Code, § 21465 ["[n]o person shall place any "unofficial" sign that resembles a traffic control device or which attempts to direct the movement of traffic" on or in view of any highway].)

Seaber addressed a similar question whether a hotel had a duty to warn of a dangerous condition posed by a public crosswalk. In *Seaber* a pedestrian was struck by a car and killed while he was walking in a marked crosswalk on a public highway located adjacent to a hotel. The pedestrian was using the crosswalk to walk from the hotel to his car, which he had parked across the highway in a parking lot not owned by the hotel. The pedestrian's family filed a wrongful death suit against the hotel, claiming the crosswalk, which was located just below the crest of a hill and was not controlled by a signal or flashing lights, was dangerous and the hotel had a duty to guide its patrons to another means of ingress and egress. The hotel moved for summary judgment, asserting, among other things, it had no duty as a matter of law to protect against the danger posed by the public crosswalk, which they did not own or control and which was used by many persons other than hotel guests. The trial court granted summary judgment for the hotel; and the Court of Appeal affirmed, finding the hotel had no duty to protect against a traffic danger on a public avenue over which it had no control even if it knew the traffic condition was dangerous. Citing *Teichert, supra,* 179 Cal.App.3d 661, among other cases, the court held, "[J]ust as a property owner has no duty to erect signs for the

purpose of controlling or regulating traffic on adjacent public roads and may in fact be prohibited by law from doing so, similarly a landowner cannot be responsible for such signage controlling or regulating pedestrian traffic across public highways." (*Seaber, supra,* 1 Cal.App.4th at p. 492.)

In finding no duty to warn of traffic conditions on the public roadway, the *Teichert* and *Seaber* courts emphasized the property owner's lack of control over the public street. If there is no control over the public roadway, the courts explained, there can be no duty to maintain it in any particular way, including warning of dangerous conditions. (See *Teichert, supra,* 179 Cal.App.3d at pp. 663-664 ["[P]roperty owner not only has no duty to erect signs for the purpose of controlling or regulating traffic on adjacent public roads, but is in fact prohibited from doing so. ['The power to control public streets and regulate traffic lies with the state which may delegate local authority to municipalities'"]; *Seaber, supra,* 1 Cal.App.4th at p. 492 ["because the Hotel lacked effective control over the crosswalk, it cannot be shackled with a duty to warn pedestrians of the dangerous risk the crosswalk posed"]; see also *Nevarez v. Thriftimart, Inc.* (1970) 7 Cal.App.3d 799, 803 [no duty to post a sign to regulate traffic condition on adjacent public roads].)

Had the risk inherent in the public traffic conditions been exacerbated by a condition, natural or artificial, on the landowner's own property, both *Teichert and Seaber* make clear a duty would have been recognized. (See *Teichert, supra,* 179 Cal.App.3d at p. 663 [summary judgment proper because plaintiff had made "no showing that the accident[,] which [had] resulted in his son's death[,] was attributable to any specific condition, natural or artificial, on Teichert's [own] property"]; *Seaber, supra,* 1 Cal.App.4th at p. 487 ["landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting upon his property [citation] or to warn travelers a dangerous condition *not created by him* but known to him and not to them"], italics added.) Indeed, the *Seaber* court expressly noted its holding may have been different had the accident occurred because of the hotel's failure to include safe passage to its facility from its own parking lot. (*Seaber,* at pp. 494-495, fn. 9 [distinguishing

cases finding liability on the ground the hotel neither owned the parking lot nor provided it as a parking facility for its patrons].)

Unlike in *Seaber* and *Teichert*, Adato does not simply assert the property owner had a duty to warn of traffic conditions. Rather, he alleges the Park Plaza parties affirmatively relocated the driveway to a place where left turns were dangerous and prohibited, yet failed to do anything, including posting a sign, to mitigate that danger. The general principle there is no duty to warn of existing traffic conditions on the public street is simply not dispositive. (See *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 518 [*Teichert* and *Seaber* are inapposite because they involve "a failure to take affirmative action to protect persons from dangerous conditions on adjacent property. Here, plaintiffs have alleged their injuries were caused in part by a dangerous condition on Chevron's property."].)

The Park Plaza parties nonetheless insist they negated the element of duty by demonstrating there was no dangerous condition, natural or artificial, on their property. They contrast the instant case with *Barnes v. Black, supra,* 71 Cal.App.4th 1473, where the appellate court reversed summary judgment on the ground the defendant had not demonstrated the absence of a legal duty. In *Barnes* a child riding a tricycle near his apartment complex's designated play area veered off the path and accidentally careened down the complex's steep-sloped driveway into an abutting four-lane highway where he was struck by a motorist and killed. The child's parents sued the owners of the complex for negligence, arguing a barrier should have been erected to prevent such easy access to the driveway by children going to and from the play area. The apartment owners successfully moved for summary judgment, arguing they had no duty as a matter of law to protect against injuries that occurred on the public street. The appellate court disagreed, explaining the location of the accident is not dispositive: "The duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Id.* at p. 1478.) Because the defendant did not negate the allegation a dangerous condition existed on the property itself, namely the

configuration of the steep-sloped driveway next to a path designated for children without some corresponding barrier to prevent children from wandering onto the driveway, summary judgment on the question of a legal duty was improper. (*Id.* at p. 1479.)

The Park Plaza parties insist the evidence before the court on their summary judgment motion established the Piedmont's driveway did not "eject" Mullikin into the street against her will, as had occurred in *Barnes*, or force her to turn left. It did nothing more than enable drivers to enter and leave the property—the very purpose of a driveway. As in *Teichert* and *Seaber*, any dangers due to traffic conditions or restrictions on the public roadway are not the responsibility of the adjacent property owner. The Park Plaza parties define the issue too narrowly.

A property owner's duty of reasonable care includes a duty to make its entrance and exit safe for those using it and those on the adjacent road who are reasonably affected by it. (See *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239 [property owner's duty of reasonable care in maintaining premises encompasses "such means of ingress and egress as a customer may reasonably be expected to use"]; *Gerard v. Wilson Holding Co.* (1947) 79 Cal.App.2d 553, 555 [same].) Adato alleged the driveway was not safe because it was constructed in a manner that brought drivers to a location on Whitsett Avenue where left turns were both dangerous and prohibited without adequate warning. The proper question, therefore, is not whether there is a general duty to warn of existing traffic conditions or restrictions, but whether a property owner's duty of due care should be limited to exclude any duty to design and maintain the ingress and egress to its private property in a way that does not increase the risk of injury to those individuals using its driveway and to those travelling on the public road. As we explain, it simply cannot be said, categorically, there is no duty under these circumstances.

c. *The Rowland factors and public policy considerations do not support a categorical no-duty rule in these circumstances*

In *Rowland v. Christian, supra,* 69 Cal.2d 108, the Supreme Court emphasized "the basic policy of this state . . . is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of property," (*id.* at p. 119) but recognized an exception to the general duty rule may occasionally be warranted in the absence of a statutory provision establishing one when "clearly supported by public policy." (*Id.* at p. 112.) "A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Id.* at p. 113.)

In determining whether the circumstances warrant creating an exception to the general duty rule, "the *Rowland* factors are evaluated at a relatively broad level of factual generality." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772 (*Cabral*).) The essential question is not whether the facts of a particular case justify departure from the general duty rule, "but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Ibid.*) Limiting exceptions to broad, "categorical" exceptions justified by "foreseeability and policy considerations . . . preserve[s] the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Ibid.*)

Application of the *Rowland* factors in this case does not support a departure from the general duty rule. It is certainly foreseeable that placement and construction of a driveway for entry to and exit from a subterranean parking garage could increase the risk

of injury otherwise posed to residents and visitors using the driveway and to motorists on the public road. Furthermore, the connection between the defendant's conduct in constructing the driveway and the injury suffered by a motorist as a result of an illegal turn out of the driveway is not attenuated. (See, e.g. *Cabral, supra,* 51 Cal.4th at p. 768 [drivers do not always use reasonable care; "[t]hat drivers may lose control of their vehicles and leave a freeway for the shoulder area, where they may collide with any obstacle placed there, is not categorically unforeseeable"]; see also *id.* at p. 779 [the closeness of the connection between the defendant's conduct and the injury suffered "is strongly related to the question of foreseeability itself"].)[7]

The remaining *Rowland* factors are analyzed in terms of public policy. (*Cabral, supra,* 51 Cal.4th at p. 781.) The moral blame factor, as the Park Plaza parties acknowledge, is assessed not in terms of whether the defendant committed some heinous act, but simply whether there is any state policy promoting or protecting the defendant's conduct. (See *Cabral,* at p. 782.) There is none. Although a landowner may not post a sign on public property regulating or warning of traffic conditions (Veh. Code, §§ 21352, 21355, 21465), nothing prohibits it from doing so on its own property outside the view of the public road.

As for prevention of future harm, the Park Plaza parties insist drivers who ignore street striping are equally as likely to ignore signage. That analysis is steeped in causation, not public policy. While a trier of fact may well decide otherwise, it cannot be held as a matter of law that appropriate signage would not have reduced the danger posed by the configuration of the driveway and the public road.[8] Finally, whatever additional

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7 The second *Rowland* factor is not disputed: There is no question Adato was injured.

8 For the same reason, the Park Plaza parties' alternative argument on causation, an argument advanced in their summary judgment motion but not reached by the trial court, fails. It cannot be said as a matter of law that a proper sign would have been ignored by Mullikin. (See *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666 ["[c]ausation is generally a question of fact for the jury, unless reasonable minds could not dispute the

burden is imposed on a property owner, who can obtain insurance to help spread the costs, it plainly is not so significant that it justifies a departure from ordinary duty rules.

The Park Plaza parties insist it would be unfair to impose a duty here because there had been no accidents, or even complaints, about the driveway in the several years since the apartment complex had been built. Moreover, they argue, the street striping itself did not indicate left turns out of the driveway were dangerous; the double-double yellow lines at that location predated the placement of the driveway. These arguments, specific to the conditions of this accident and supportive of a conclusion the Park Plaza parties' failure to post a warning sign was reasonable, are not before this court, as the issue of breach of duty was not raised in the motion for summary judgment or considered by the trial court.[9] While these arguments may ultimately prove persuasive either to the court in an appropriate summary judgment motion directed to breach or to the jury at trial, they do not justify a categorical no-duty rule for property owners whose construction of a means of ingress and egress to their property is alleged to have increased the risks of an accident. (See *Cabral, supra,* 51 Cal.4th at p. 772.)

Garcia, supra, 164 Cal.App.4th 1448 (*Garcia*), in which our colleagues in the Fifth District Court of Appeal applied the *Rowland* factors to reach a contrary conclusion, does not alter our analysis. In *Garcia* the plaintiff, a passenger in a van on a public road, suffered substantial injuries when the van collided with a truck travelling on an intersecting private farm road. The driver of the truck travelling on the private road was not familiar with the farm road or the blind intersection. The plaintiff alleged the owner of the private road had a duty to place a sign on its private road warning of the approaching intersection so drivers would have sufficient time to stop before entering the intersection.

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absence of causation"]; *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864 [same].)

9 Although the Park Plaza parties' notice of motion stated the motion for summary judgment was made on the grounds there was no duty, breach or causation as a matter of law, their memorandum of points and authorities did not address the issue of breach.

The plaintiff prevailed at trial; the Court of Appeal reversed, defining the issue as whether the owner of a private, rural road has a duty to post a sign to warn persons unfamiliar with the farm road and who are travelling at an excessive rate of speed of the upcoming intersection. (*Garcia, supra,* 164 Cal.App.4th at p. 1457.) Having framed the issue in this narrow fashion, the court, applying the *Rowland* factors, found it was unforeseeable the property owner's private road would be used by persons unfamiliar with it because it was not previously known to have been used as a short-cut by individuals not connected with the owner's farming operations. (*Garcia,* at p. 1458.) It was equally unforeseeable, the court found, it would be used by people driving at an excessive rate of speed. The court observed "there was no evidence" the property owner knew or should have known people drive at unsafe speeds on the private road. (*Id.* at p. 1458.) In addition, the court determined the connection between the property owner's inaction and the plaintiff's injury was "not particularly close" because "[t] he intersection might well have been visible to a driver traveling at an appropriate speed . . . ." (*Id.* at p. 1460.) Finally, the court found the burden imposed on rural landowners if such a duty were found to be "relatively high: It would require every rural landowner to post adequate warnings at every place a farm road intersects a public road . . . even though it has no knowledge that the road is being used by members of the public, and even though the vegetation does not encroach on the dedicated right-of-way of the public road. Such a duty not only would require initial placement of the warning signs or devices, but inspections necessary to determine that signs or devices have not been stolen, vandalized, or damaged." (*Id.* at p. 1459.)

As for the public policy considerations identified in *Rowland,* the *Garcia* court found the record in the case supported a finding of no duty: The property owner's conduct was not morally blameworthy. The owner was "simply using its land in a wholly typical manner for the production of citrus crops; its trees did not encroach on the public right-of-way and it did not hold the road open for public use." (*Garcia, supra,* 164 Cal.App.4th at p. 1460.) Moreover, while a duty to post a sign might prevent future harm, there was no guarantee of that result. "A stop sign or a warning sign is effective

only if a driver has time to react after seeing it, the third party actor in this case was already traveling at an unsafe rate of speed; other speeders in such circumstances may or may not have time to react to a warning sign, depending on their exact speed and the particular placement of the sign." (*Id.* at p. 1460.)

As indicated, *Garcia,* decided several years before *Cabral, supra,* 51 Cal.4th 764, rested its analysis on facts specific to that case—the excessive speed of the plaintiff's driver and the property owner's lack of notice that persons would travel at unsafe speeds—as opposed to the "broad level of generality" now required by *Cabral.* (See *Cabral,* at p. 772.) It is unlikely the *Garcia* court's analysis would have been the same had that court had the benefit of the *Cabral* decision. (See *id.* at p. 773 ["[a]n approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court'"].)

In any event, *Garcia* is also factually inapposite. It may be, even when considered at a broad level of generality, that private rural roads utilized only by farm workers are categorically different from the driveways of businesses or apartment complexes in urban areas that are not as limited in terms of users. As for the instant case, Mullikin's familiarity with Whitsett Avenue and the existing traffic conditions and regulations is not for the court to consider in analyzing the question of duty. Applying the requisite broad level of generality, the appropriate inquiry is whether a property owner should be categorically excluded from any duty of reasonable care to mitigate the increased risk to motorists and those entering and leaving its property created by its construction of a driveway. Neither the undisputed facts of this case nor the public policy considerations of *Rowland* support finding such a categorical exclusion.

In sum, the Park Plaza parties failed to meet their burden on summary judgment to negate the essential element of duty in this action for negligence/premises liability. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 362 [the absence of a legal duty

is a "complete defense" to a cause of action for negligence].) Accordingly, summary judgment on this ground was improper.

Trial of the Affirmative Defense of Design Immunity

1. *Substantial Evidence Supports the Trial Court's Ruling on Design Immunity,*

a. *Governing law on design immunity and standard of review*

Government Code section 835 provides, unless exempted by statute, "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and . . . [¶] . . . [¶] [t]he public entity had actual or constructive notice of the dangerous condition under [Government Code] [s]ection 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." However, a public entity may avoid liability for a dangerous condition of public property under the affirmative defense of design immunity as described in Government Code section 830.6 (section 830.6).[10] "The rationale for design immunity is to prevent a jury from second-

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10 Government Code section 830.6 provides, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event

guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.] ‘“‘[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable [individuals] may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.’”’” (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69 (*Cornette*).)

To establish the design immunity defense, the public entity must show a causal relationship between the accident and the plan or design (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1157-1162); the plan or design was either approved in advance by the entity's legislative body or prepared in conformity with standards previously approved (*Hernandez v. Dept. of Transportation* (2003) 114 Cal.App.4th 376, 388); and there was substantial evidence on the basis of which a public entity could have reasonably adopted the plan or design (*Cornette, supra,* 26 Cal.4th at p. 66).

Even when it is found to exist, "[d]esign immunity does not necessarily continue in perpetuity." (*Cornette, supra,* 26 Cal.4th at p. 66; see *Baldwin v. State of California* (1972) 6 Cal.3d 424, 431 ["[D]esign immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blue prints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard."], fn. omitted.) A plaintiff may demonstrate a loss of

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that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. . . ."

design immunity by showing: (1) The plan or design has become dangerous due to a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan or that the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings of the changed conditions. (*Cornette*, at p. 66.)

The question whether the plan was reasonable when adopted by the entity—an element of design immunity—is determined by the court, considering whether there is any "substantial evidence" on which a reasonable public entity could have approved the plan. (*Cornette, supra,* 26 Cal.4th at p. 66.) The remaining questions on the applicability of design immunity and whether it has been lost are for the trier of fact to determine when disputed facts are presented. (*Id.* at pp. 66-67.)

On appeal from a bench trial on the question of design immunity, we review the court's factual findings for substantial evidence. (See *Cornette, supra,* 26 Cal.4th 63 [absent undisputed evidence, other factors of design immunity and whether it has been lost are factual questions for jury to consider]; see generally *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469 [appellate court reviews factual determinations for substantial evidence].)

b. *Substantial evidence supports the court's finding the relocation of the driveway did not result in a loss of design immunity*

Adato contends no evidence was presented at trial to support the first element of design immunity, a causal relationship between the City's 1990 traffic plan and the accident. Relying on *Cameron v. State of California* (1972) 7 Cal.3d 318 (*Cameron*), he argues the City did not establish the requisite connection because the driveway was not in existence at the time the street's design was considered and approved. Accordingly, it cannot be said the accident was the result of the City's design.

In *Cameron* motorists were injured when their automobile went out of control while attempting to negotiate an "S" curve on a public highway maintained by the state.

(*Cameron v. State of California, supra*, 7 Cal.3d at p. 321.) The motorists sued for negligence, alleging the curve had been improperly (and negligently) graded to such an extent an automobile going at lawful speed could not negotiate it and the state had failed to warn of the dangerous condition. (*Id.* at p. 322.) In response the state asserted the affirmative defense of design immunity.

At trial the state moved for, and obtained, a directed verdict on the ground it was immune from liability under section 830.6. (*Cameron, supra,* 7 Cal.3d at p. 322.) The Supreme Court reversed, finding design immunity did not apply because the particular elevation grade actually constructed—a "superelevation" caused by the contractor's negligence—had not been part of the design. (See *id.* at p. 326 [the state had failed to establish the "superelevation which was actually constructed on the curve in question in this matter was the result of or conformed to a design approved by the public entity vested with discretionary authority"].) In concluding the state had not established the elements of design immunity, the Court distinguished the case before it, which involved the absence of a nexus between the plan and the accident, and cases in which the plan as adopted was reasonable but became unreasonable due to a change in physical conditions. The Court observed, "Plaintiffs have offered no proof whatsoever of changed physical conditions in Highway 9 since the plan was adopted." (*Id.* at p. 326, fn. 10)

Cameron is inapposite. In *Cameron* the design the state advanced as the basis for immunity had not been implemented by the contractor. Thus, the accident could not have been caused by the design. Here, the design, which included street striping but not a median or signage of any kind to reinforce the striping, had been fully implemented. (See *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 54 ["[I]n *Cameron,* what caused the accident—uneven superelevation—was not part of the plans. In the instant case, in contrast, what caused the accident—the absence of a median barrier—was part of the design"].)

Adato's challenge to the applicability of design immunity is based not on the reasonableness of the original plan for Whitsett Avenue,[11] but on the placement and construction of the Piedmont driveway in 2001-2002. Accordingly, the proper question, as the trial court observed, was whether the design had become unreasonable and dangerous when the current driveway was built. Fisher and Pringle testified the plan remained reasonable in light of existing traffic conditions. The 198-unit complex, they explained, was not the kind of significant change in conditions that merited a new design. Pringle testified the street striping was plainly visible and provided adequate warnings to drivers leaving the complex without the need for additional signage to reinforce the no-left-turn restriction.

Adato challenges the court's findings by emphasizing the testimony of his own expert traffic engineer, Ruzak. However, after a trial, we do not evaluate the credibility or relative weight of the witnesses' testimony, but only determine whether substantial evidence supports the court's findings. Based on this testimony, the court, acting as fact-finder, ruled Adato had not established the change in physical conditions—the development of the property and relocation of the driveway—made the design unreasonable and dangerous. Fisher and Pringle's testimony constitutes substantial evidence supporting the court's findings.

c. *Adato has abandoned or forfeited any argument the judgment must be reversed because it did not address Adato's failure-to-warn theory under Government Code Section 830.8*

Citing *Cameron, supra,* 7 Cal.3d 318, Adato contends, as he did in his trial brief, a finding of design immunity does not fully resolve the question of the City's liability because, even if immunity attaches, a public entity may still be held liable under Government Code section 830.8 for a failure to warn of a hidden dangerous condition in

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11 Adato does not challenge testimony concerning the reasonableness of the design when it was adopted in 1990.

a design.[12] In *Cameron* the Court stated, "where the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident." (*Cameron*, at p. 329.)

The City contends the absence of signage is part of the design itself; it is nonsensical to immunize the City for liability for a design condition that caused the accident, but then authorize liability for failure to warn of the design condition. (See *Weinstein v. Department of Transportation, supra,* 139 Cal.App.4th 52, 61 ["'It would be illogical to hold that a public entity immune from liability because the design was deemed reasonably adoptable, could then be held liable for failing to warn that the design was dangerous.'"].) They distinguish *Cameron* on the ground the Court found the defect was not part of the design. (See *Weinstein*, at p. 61 [*Cameron* is inapposite because "involved the failure to warn of a hidden dangerous condition that was not part of the approved design of the highway."].) Moreover, unlike the defect in *Cameron*, any alleged defect in the design was not "hidden" and thus Government Code section 830.8 is inapplicable.

Adato has failed to preserve his claim of negligence under Government Code section 830.8, whatever merit it may or may not have, and has forfeited his argument the judgment entered by the trial court did not fully resolve his case against the City. Adato had ample opportunities to raise this matter with the trial court, either by objecting to the

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12 Government Code section 830.8 provides, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

statement of decision or moving to modify or vacate the judgment. (See Cal. Rules of Court, rule 3.1590(g) [authorizing any party to file objections to statement of decision]; Code of Civ. Proc., § 662 [after bench trial court may on any terms that may be just "change or add to the statement of decision, modify the judgment in whole or in part, vacate the judgment in whole or in part"].) Adato did neither, and thus has abandoned that claim. (See *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-800 [appellant asserting error must have raised issue in trial court and given trial court opportunity to correct error; "'it is inappropriate to allow any party to "trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable"'"]; *In re S.C.* (2006) 138 Cal.App.4th 396, 406-407 [same].) In any event, Adato raised this issue for the first time in his reply brief. For that reason alone, we do not consider it. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 ["[o]bvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant"]; *America Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"].)

DISPOSITION

The judgment and postjudgment order as to the Park Plaza parties are reversed, and the cause remanded for further proceedings not inconsistent with this opinion. The judgment in favor of the City is affirmed. The City is to recover its costs on appeal; Adato and the Park Plaza parties are to bear his and its own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.